CHAPTER 10

JUDGMENTS, COSTS, AND FEES

10.1 Introduction.

The maxim "you can't win 'em all" certainly applies to defending the United States in litigation as it does to the rest of life's endeavors. Some cases are lost in either the trial or appellate courtroom and the resulting judgment must be satisfied. Others are settled before trial or final judgment and the settlement agreement calls for the United States to pay the plaintiff a sum of money. Win or lose, the issue of what litigation costs and expenses are payable or recoverable is also an important one for the Federal litigator. This chapter highlights the procedures for satisfying money judgments or settlements on behalf of the United States and reviews the law governing the award of costs and attorneys fees.[1]

10.2 Judgments and Settlements.

a. Judgments Against the United States.

Absent some specific statutory provision to the contrary, agency salary and operations appropriations are generally not available to satisfy judgments. In fact, before 1956, judgments entered against the United States were paid only after Congress passed a specific appropriation. Thus, a litigant could find himself with a valid judgment against the United States but no source of funds to legally satisfy

[1]The General Accounting Office (GAO) is ultimately responsible for approving payments of civil judgments against the United States. For a detailed treatment of Federal appropriations in general and the payment of judgments entered against the United States in particular, see Office of the General Counsel, United States General Accounting Office, Principles of Federal Appropriations Law (2d ed. 1991) [hereinafter Principles of Federal Appropriations Law].

the judgment.[2] Congress changed the rule in 1956 and established a permanent appropriation, commonly know as the "judgment fund," to pay judgments and settlements rendered against the United States.[3] The permanent appropriation statute provides, in part, as follows:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when-
>
> (1) payment is not otherwise provided for;
> (2) payment is certified by the Comptroller General; and
> (3) the judgment, award, or settlement is payable-
>
> (A) under section 2414, 2517, 2672, or 2677 of title 28;
> (B) under section 3723 of this title;
> (C) under a decision of a board of contract appeals; or
> (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2473).[4]

The statute sets several criteria for payment of judgments, awards, or settlements. First, the permanent appropriation is only used when "payment is not otherwise provided for."[5] Two examples that arise frequently in the military departments where the judgment fund is not available are

---

[2] See, e.g., 15 Comp. Gen. 933 (1936) (disallowing judgment claims where no statute authorized payment of court costs); 5 Comp. Gen. 203 (1925) (stating that judgments rendered against the United States by district courts must be transmitted by Secretary of Treasury to Congress for an appropriation).

[3] 31 U.S.C. § 1304 (1983 & Supp. 1999). But see 60 Comp. Gen. 375 (1981) (agency salary appropriations are used where the agency is required to promote an employee and pay him or her at a higher grade). For a discussion of the history of the judgment fund, see Principles of Federal Appropriations Law, supra note 1, at 12-3 to 12-6.

[4] 31 U.S.C. § 1304(a) (1983 & Supp. 1999). The judgment fund is the source of money for the payment of compromise settlements as well as judgments entered by court decisions.

[5] Id. § 1304(a)(1).

administrative settlements under the Federal Tort Claims Act (FTCA) for $2,500 or less[6] and settlements under the Military Claims Act for $100,000 or less.[7] In both of these instances the statutes specifically require the use of appropriations available to the agency. If an FTCA claim is settled administratively for more than $2,500, the entire amount is payable from the judgment fund.[8] Under the Military Claims Act, on the other hand, the judgment fund pays only the amount that exceeds $100,000; agency appropriations must satisfy the initial $100,000.[9] The Equal Access to Justice Act[10] also requires agency appropriations to be used for certain fee awards.[11]

The second criteria for payment from the judgment fund is "certification" by the General Accounting Office (GAO). This is essentially a ministerial task and does not involve review of the case on the merits.[12] The procedures differ slightly, depending on the court that entered the judgment. For judgments entered by the district courts, the Justice Department sends GAO a certified copy of the judgment and any related orders along with a transmittal letter that identifies the type of case and agency involved and states that the judgment is final and no further appellate review will be sought. The transmittal letter also specifies the payee of the check and directs return of the check through the appropriate Department of Justice attorney for delivery to the plaintiff. The GAO then determines if there is any setoff, indebtedness, or other deduction due the United States, and sends a "Certificate of Settlement" to the Treasury Department. The Treasury Department prepares the check and mails it

---

[6]28 U.S.C. § 2672 (1994).

[7]10 U.S.C. § 2733(d) (1998).

[8]28 U.S.C. § 2672 (1994).

[9]10 U.S.C. § 2733(d) (1998); 31 U.S.C. § 1304(a)(3)(D) (1983 & Supp. 1999).

[10]5 U.S.C. § 504 (1996 & Supp. 1999); 28 U.S.C. § 2412 (1994 & Supp. 1999).

[11]See infra § 10.4(b).

[12]See Principles of Federal Appropriations Law, supra note 1, at 12-29 to 12-33.

back to the Department of Justice attorney who then delivers the check to the plaintiff and obtains any appropriate releases.

For judgments of the Court of Federal Claims, both the Department of Justice and the plaintiff are involved in requesting payment. The Department of Justice merely notifies GAO that the judgment is final and no further review will be sought. The plaintiff must send GAO a copy of the judgment and request payment. The GAO then certifies the judgment for payment and the Treasury Department issues the check and mails it according to the instructions in the plaintiff's letter requesting payment.

The last criteria is that the judgment, award, or compromise settlement must be "final." A "final decision" for appealing an adverse ruling under 28 U.S.C. § 1291 and a "final judgment" for purposes of paying a judgment are not the same. For purposes of appellate jurisdiction, "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[13] With certain exceptions, only final judgments are appealable.[14] The fact that the "final decision" is subject to appeal means that it could change, and an order imposing liability could be reversed. Obviously, payment of a "final judgment" in that context is not what is meant by a "final judgment" for purposes of 31 U.S.C. § 1304. Judgments against the United States are not paid until the litigation is over. This may mean after review by the Supreme Court, after a decision by an appellate court, or even after the initial decision by the trial court. The idea behind the finality requirement is to prevent the premature payment of funds from the public fisc. Thus, a "final judgment" for payment purposes is a judgment that is "conclusive by reason of loss of the right of appeal --by expiration of time or otherwise -- or by determination of the appeal by the court of last resort."[15] Once the Attorney

---

[13]Catlin v. United States, 324 U.S. 229, 233 (1945).

[14]See supra § 9.3e for a discussion of the collateral order doctrine and its applicability to interlocutory orders denying claims of official immunity.

[15]Principles of Federal Appropriations Law, supra note 1, at 12-25 (quoting Comp. Gen. Dec. B-129227 (22 Dec. 1980)).

General determines that the United States will not appeal an adverse decision or will seek no further review, the judgment is "final" and payable even though the time for filing a notice of appeal has not expired.[16]

Examples of judgments paid from the judgment fund include court-ordered back pay awards resulting from federal discriminatory job practices,[17] front pay awards in the form of damage awards,[18] and civil damage penalties or fines entered against agencies by court orders or settlement agreements.[19]

b. Judgments Against Individual Defendants.

Federal employees sued in their individual capacities are generally personally responsible for judgments entered against them. However, a few exceptions to the rule exist. Where the individual is merely a nominal defendant, the judgment fund is the proper source of funds for payment.[20] Agency salary appropriations are another source from which the individual could satisfy personal judgments in some circumstances. They may be used, for example, to satisfy contempt fines incurred without negligence and in compliance with departmental regulations[21] or to reimburse an employee, if authorized

---

[16] Id. at 12-25.

[17] 60 Comp. Gen. 375 (1981); 58 Comp. Gen. 311 (1979).

[18] 60 Comp. Gen. 375 (1981).

[19] 58 Comp. Gen. 667 (1979).

[20] 58 Comp. Gen. 311 (1979) (judgment fund is the source for judgments against nominal official defendant, in Title VII employment discrimination actions). See Richerson v. Jones, 551 F.2d 918, 925 (3d Cir. 1977) (U.S. is real party defendant in Equal Employment Opportunity Act suit even though Act requires that the supervisor be used as the named defendant).

[21] 44 Comp. Gen. 312 (1964) (authorizing use of appropriation to pay $500.00 fine imposed by district court on FBI agent for offense committed in performance of his duty).

by Congress, when a suit against an employee is based upon his official acts performed in the discharge of an official duty.[22]

c. Interest on Judgments.[23]

Payment is normally due when the court enters its final judgment and interest begins to accrue at that point based on Treasury Bill rates.[24] Judgments against the United States, however, are an exception. Interest on a judgment against the United States is recoverable only if the United States appeals and the district court's judgment is affirmed.[25] In that situation, interest is payable from the date of filing of the judgment with GAO to the day before the court of appeals issues its mandate of affirmance.[26] The party seeking to recover the interest must file the judgment with the GAO.[27] Interest will not begin to accrue before the judgment is filed.

---

[22]56 Comp. Gen. 615, 618 (1977); see Dec. Comp. Gen. B-176229 (Oct. 5, 1972), aff'd, B-176229 (May 1, 1973) (stating the rule but precluding reimbursement for Bureau of Indian Affairs employee); Dec. Comp. Gen. B-182219 (Oct. 3, 1974) (denying reimbursement to state Adjutant General sued by technician).

[23]This section applies to post-judgment interest. With respect to pre-judgment interest, the traditional "no interest rule" (i.e., the United States is not liable for prejudgment interest absent a clear and specific waiver of sovereign immunity) applies. See Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). Congress has, in certain instances, waived the sovereign immunity of the United States for the payment of prejudgment interest. See, e.g., 5 U.S.C. § 5596(b)(2) (1996 & Supp. 1999)(back pay to civilian employees subjected to unjustified or unwarranted personnel actions is payable with interest).

[24]28 U.S.C. § 1961 (1994 & Supp. 1999).

[25]31 U.S.C. § 1304(b) (1983 & Supp. 1999).

[26]Id. § 1304(b)(1)(A) (1983 & Supp.1999).

[27]Rooney v. United States, 694 F.2d 582 (9th Cir. 1982).

Interest on judgments entered by the United States Court of Federal Claims has an additional wrinkle. Under 28 U.S.C. § 2516(a), interest on Court of Federal Claims judgments is only payable if the contract that was sued on or an act of Congress specifically provides for interest. Assuming a contractual or statutory entitlement to interest, the unsuccessful appeal rule applies.[28] As with district court judgments, the plaintiff must file a copy of the judgment with GAO and interest accrues only from the date of filing through the day before the mandate of affirmance.[29]

10.3 Costs

a. General.

In addition to the money necessary to satisfy a judgment on the merits, the United States may also be responsible for the "taxable" costs incurred by the prevailing party in the litigation.[30] The party seeking costs must "prevail;" no authority exists to award costs to a nonprevailing party.[31]

Recoverable costs include: (1) clerk and marshall fees, (2) court reporter fees for transcripts, (3) printing and witness fees, (4) fees for exemplification and necessary copies, (5) docket fees under 28 U.S.C. § 1923, and (6) compensation for court appointed interpreters.[32] Although the sovereign

[28]31 U.S.C. § 1304(b)(1)(B) (1983 & Supp. 1999).

[29]Id.

[30]Fed. R. Civ. P. 54(d). For a thorough discussion of the recovery of costs and expenses in federal litigation, see Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553 (1984). See also Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) ("heavy presumption" in favor of recovering costs under Fed. R. Civ. P. 54(d)).

[31]Worsham v. United States, 828 F.2d 1525, 1527 (11th Cir. 1987).

[32]28 U.S.C. § 1920 (1994). See also 28 U.S.C. § 1911 (1994) (clerk fees for Supreme Court); 28 U.S.C. § 1913 (1994) (clerk fees for Court of Appeals); 28 U.S.C. § 1931 (1994 & Supp. 1999) (clerk fees for district courts); 28 U.S.C. § 1921 (1994) (marshall fees).

immunity of the United States would normally protect it from taxable costs, 28 U.S.C. § 2412(a) waives such immunity by stating:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title...may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

Although the federal rules create a heavy presumption in favor of the prevailing party recovering costs,[33] the court, in its discretion, can deny costs to the prevailing party. The court must, however, explain the reason for the denial of costs to the prevailing party.[34] Indigence and good faith of the losing party,[35] misconduct or bad faith by the prevailing party,[36] and absence of a clear victor[37] are all reasons for denying costs to the prevailing party. Appellate courts review a trial court's cost award decision under an abuse of discretion standard.[38]

b. Allowable Costs.

---

[33]Sun Ship, Inc. v. Lehman, 655 F.2d 1311, 1314 (D.C. Cir. 1981).

[34]See e.g., Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1553 (Fed. Cir. 1983).

[35]See e.g., United States v. Bexar County, 89 F.R.D. 391 (W.D. Tex. 1981) (costs not taxed to indigent plaintiffs when suit was neither frivolous nor brought in bad faith); Schaulis v. CTB/McGraw-Hill, Inc., 496 F. Supp. 666 (N.D. Cal. 1980) (costs of $1,400 denied when plaintiff was indigent and brought suit in good faith).

[36]Wilkerson v. Johnson, 669 F.2d 325, 330 (6th Cir. 1983) (costs denied when counsel for prevailing party failed to file brief or appear at oral argument).

[37]Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279, 1282 (8th Cir.), cert. denied, 449 U.S. 1042 (1980) (each party prevailed on one or more issues).

[38]United States Marshals Service v. Means, 724 F.2d 642, 648 (8th Cir. 1983).

The costs listed in 28 U.S.C. § 1920 are, for the most part, unambiguous. Allowing a party costs for clerk fees, docket fees, and interpreter compensation is uncontroversial. The recovery of fees for transcripts prepared by court reporters, printing and witness fees, and fees for exemplification and copies, however, have been the subject of litigation.

Trial and deposition transcript costs are recoverable only when the transcripts are "necessarily obtained for use in the case."[39] This is a factual determination made by the court.[40] Because courts have broad discretion in taxing costs, the appellate courts are reluctant to second guess the determination of whether a particular deposition or trial transcript was "necessary" for use in the case.[41] While some courts deny costs of discovery depositions taken purely for investigation or preparation purposes and not used as evidence,[42] the real inquiry is whether the deposition was "necessary" for proper handling of the case at the time it was taken. The trend seems to be that some amount of pure discovery is "necessary" and recovery of those costs should be determined on a case-by-case basis.[43] An extra step is required to recover the cost of daily transcripts. Parties may recoup them only with prior court approval where the copies are necessary for the court as well as the requesting counsel.[44]

---

[39]28 U.S.C. § 1920(2) (1994).

[40]Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982).

[41]See 6 James W. Moore, et al., Moore's Federal Practice & Procedure 54.77[4] (2d ed. 1985) [hereinafter Moore et al.].

[42]See, e.g., Hudson v. Nabisco Brands, Inc., 758 F.2d 1237 (7th Cir. 1985). Compare Hill v. BASF Wyandotte Corp., 547 F. Supp. 348, 351 (E.D. Mich. 1982) (discovery deposition costs not taxable) with Independence Tube Corp. v. Copperweld Corp., 543 F. Supp. 706, 717 (N.D. Ill.), aff'd, 691 F.2d 310 (7th Cir. 1982), rev'd on other grounds, 467 U.S. 752 (1984) (discovery deposition costs taxable).

[43]Moore et al., supra note 41 at 54.77[4].

[44]In re Air Crash at John F. Kennedy Int'l Airport on June 24, 1975, 687 F.2d 626 (2d Cir. 1982).

Copying costs are treated like transcript costs; they must be obtained for use in a case before the costs can be recovered.[45] The production of demonstrative evidence is considered necessary only in complex or unusual cases. Prior approval of the court to incur costs for production of demonstrative evidence may be necessary to guarantee reimbursement.[46]

Finally, the court may require the losing party to pay witness fees. Daily witness fees are usually $40/day and witness travel expenses are equivalent to those allowed federal employees on TDY.[47] Expert fees above these limits are not recoverable under 28 U.S.C. § 1920.[48] Although a party is not normally considered a witness,[49] employees of a corporate party that testify are considered witnesses and their fees are therefore recoverable.[50]

c. Procedure for Obtaining Costs.

---

[45]28 U.S.C. § 1920(4) (1994). See also Fogelman v. ARAMCO, 920 F.2d 278 (5th Cir. 1991).

[46]See, e.g., Rogal v. American Broadcasting Cos., No. 89-5235, 1994 WL 268250 (E.D. Pa. June 15, 1994), aff'd, 74 F.3d 40 (3d Cir. 1996) (courts allow taxation of copying costs for discovery materials, pleadings, deposition transcripts, trial transcripts, and exhibits); Studiengesellschaft Kohle v. Eastman Kodak, 713 F.2d 128, 132-33 (5th Cir. 1983) (cost of preparation of models, charts, and photographs disallowed without prior approval of court).

[47]28 U.S.C. § 1821 (1994 Supp. 1999).

[48]Crawford Fitting Co. v. J.T. Gibbons, 482 U.S. 437 (1987) (holding that, since section 1920 allows courts to tax witness fees as costs only within the limits of section 1821, in the absence of statutory or contractual authorization, federal courts are constrained by the $130-per-day cap when ordering one side to pay the other side's expert witness); Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway, 284 U.S. 444, 446 (1932). Though precluded by 28 U.S.C. § 1920, a party may recover expert witness fees and other expenses under the Equal Access to Justice Act or other fee shifting statute. See infra § 10.3.

[49]Heverly v. Lewis, 99 F.R.D. 135, 136 (D. Nev. 1983).

[50]Ingersoll Milling Machine Co. v. Otis Elevator Co., 89 F.R.D. 433 (N.D. Ill. 1981).

To recover costs, the prevailing party must file a bill of costs with the clerk of court within the time allotted by local rules.[51] The clerk can award costs with only one day's notice[52] if the bill of costs is verified by an affidavit from the successful party.[53] Objections to a clerk's award of costs must be made to the court within 5 days.[54]

10.4 Attorney Fees and Other Expenses.

a. General.

Traditionally, each party pays his own expenditures incurred during litigation beyond "taxable costs." The traditional "American Rule" precludes awarding attorney fees to a prevailing party absent statutory authority.[55] Although it is common practice in England, our courts have held that such awards would effectively discourage the underprivileged from ever going to court.[56]

Exceptions to this rule have developed to accommodate instances where overriding considerations of justice call for such awards. Before the Supreme Court's decision in Alyeska Pipeline Service Company v. Wilderness Society,[57] litigants enforcing rights important to society could recover

[51]File Form AO 133 or an itemized list of allowable items.

[52]Fed. R. Civ. P. 54(d).

[53]28 U.S.C. § 1924 (1994); Wahl v. Carrier Manufacturing Co., 511 F.2d 209 (7th Cir. 1975).

[54]Fed. R. Civ. P. 54(d).

[55]Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

[56]Id. at 718.

[57]421 U.S. 240 (1975).

attorney fees from their opponents under a private attorney general theory.[58] In Alyeska, however, the Court held that environmentalists who had successfully barred the construction of an oil pipeline because it violated the Mineral Leasing Act were not entitled to attorney fees because the court lacked the statutory, contractual, or equitable power to grant such relief.[59] The Court's rejection of this method--through which less powerful litigants could challenge the activities of the powerful--acted as a catalyst for the enactment of the Equal Access to Justice Act (EAJA).[60]

Two common law exceptions to the "American Rule" exist. First, litigants who recover or maintain a common fund for a non-litigating class may have their attorney fees paid by the fund.[61] In Kargman v. Sullivan,[62] after determining that a landlord's rent increases were in violation of Boston rent control laws, the First Circuit awarded a tenant his attorney fees from an escrow account into which the court had ordered the landlord to pay the increased rent during the pendency of the litigation. The court reasoned that to have held the tenant personally liable would have been unfair because he was, in essence, representing all of the tenants. The court stated as follows:

> These cases make it clear that the federal court may award fees where the legal efforts of the parties seeking the award ultimately benefit everyone with an interest in a fund under court control. The rationale is to prevent the entire cost of legal representation from falling on the few who press the claims of many. These principles apply here, where there is a substantial court-controlled fund that will soon

[58]Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

[59]Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[60]See infra § 10.3b.

[61] Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); United States v. Equitable Trust Co., 283 U.S. 738 (1931); See generally, Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 Harv. L. Rev. 1597 (1974) (discussing common fund exception in the context of the law of restitution).

[62]589 F.2d. 63 (1st Cir. 1978).

> be returned to certain tenants. Although [the litigants] were individual tenants formally acting on behalf of themselves and not as class representatives, their interests were identical to those of most, if not all, of the tenants in the Kargmans' federally-subsidized housing. Thus the district court, in making the award, found that [the attorneys] work has largely resulted in the ultimate triumph to the defendant-intervenors . . .." Having reviewed this case on several occasions, we too accept the importance of the work of [the attorneys] in securing a result that will benefit all of the Kargman tenants, not just those that they formally represented.[63]

Another common law exception to the "American Rule" exists where the unsuccessful party is found to have engaged in bad-faith litigation.[64] In Masalosola v. Stonewall Insurance Company,[65] the plaintiff's attorney was liable for the defendant's legal fees because the insurance company's settlement practice challenged by the plaintiff was clearly not a violation of the law. Here again, principles of fairness support the court's award of fees to the prevailing party. Fee shifting based on such equitable principles is also often codified.[66]

b. Equal Access to Justice Act (EAJA).

The "American Rule" and the Supreme Court's rejection of a major exception to it in Alyeska Pipeline Service Company v. Wilderness Society created conditions that Congress believed effectively

---

[63]Id.

[64]Roadway Express Inc. v. Piper, 447 U.S. 752, 765-66 (1980)

[65] 718 F.2d 955 (1983).

[66]See Civil Rights Attorneys Fee Act, 42 U.S.C. § 1988 (1995 & Supp. 1999). Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1996 & Supp. 1999); Privacy Act, 5 U.S.C. § 552(a)(g)(2)(B) (1996 & Supp. 1999). See also Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) ("Congress enacted [within that portion of Title II of the Civil Rights Act dealing with civil actions for preventative relief] the provisions for counsel fees not simply to penalize litigants who advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief."); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

barred legitimate suits due to prohibitive litigation costs. Congress was especially concerned that questionable governmental activities might go unchallenged. Before October 1, 1981, a party prevailing against the United States could collect only "taxable costs." This hardly dented the mammoth litigation costs usually incurred when suing the government. Congress passed the EAJA[67] to ease the expense burden on litigants of relatively limited means when engaged in litigation with the United States.

The EAJA allows prevailing parties to recover fees and expenses above "taxable costs" under three circumstances. First, the Act requires the United States to pay the reasonable attorney fees of its successful opponent where common law or a statute would require similar payments from a private party.[68] Second, courts can award a prevailing party its fees and other expenses in excess of taxable costs, including expert witness fees, cost of studies, and attorney's fees where the United States' position was not "substantially justified" and no special circumstances make the award unjust.[69] Finally, when a party prevails in an administrative adversary adjudication, the EAJA requires the agency to award fees and expenses where the United States' position was not "substantially justified" and no special circumstances make the award unjust.[70] All three opportunities to recover expenditures are available on filing an application for fees within thirty days of the final judgment.

(1) 28 U.S.C. § 2412(b).

Title 28 U.S.C. § 2412(b) does not create a new entitlement or cause of action; it merely waives the United States sovereign immunity and subjects it to the existing exceptions to the "American

---

[67]Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2321, 2325-2330, codified at 28 U.S.C. § 2412 (1996 & Supp. 1999).

[68]28 U.S.C. § 2412(b) (1996 & Supp. 1999).

[69]Id. § 2412(d) (1996 & Supp. 1999).

[70]5 U.S.C. § 504 (1996 & Supp. 1999).

Rule" found in the common law and in statutes.[71] The Eleventh Circuit has recognized an additional requirement before a fee shifting statute can apply to the United States. The court held in Joe v. United States [72]that any statutory exception must be a federal statute because the House Report accompanying the EAJA stated that the United States would only pay attorney fees in accordance with "federal statutory exceptions" to the "American Rule."[73]

Fees awarded under § 2412(b) are paid from the judgment fund unless the court finds that the United States acted in bad faith. If bad faith is the basis of the fee award, payment comes from the agency's appropriations.[74]

(2) 28 U.S.C. § 2412(d).

Unlike 28 U.S.C. § 2412(b), which only waives sovereign immunity, 28 U.S.C. § 2412(d) creates an entirely new entitlement to "fees and expenses" when a party prevails in non-tort civil litigation against the United States.[75] The fees and expenses listed in § 2412(d)(2)(A) are paid from agency appropriations.[76] Fees and expenses recoverable include reasonable expenses of expert witnesses, cost

---

[71]See supra § 10.3a.

[72]722 F.2d 1535 (11th Cir. 1985).

[73]Id. at 1537 (interpreting H. Rep. No. 1418, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S.C.C.A.N. 4953, 4984, 4996); see also Mark v. Hanawha Banking & Trust Co., 575 F. Supp. 844 (D. Ore. 1983).

[74]28 U.S.C. § 2414(d)(2) (1996 & Supp. 1999).

[75]A 1996 amendment created a new basis of recovery for eligible parties against the government, even when the party does not qualify as a "prevailing party." In civil actions brought by the United States, or a proceeding for judicial review of an adversary adjudication under 5 U.S.C. § 504(a)(4) (1994 & Supp. 1999), an eligible party may recover fees related to defending against excessive and unreasonable demands by the government. 28 U.S.C. § 2412(d)(1)(D) (1996 & Supp. 1999).

[76]28 U.S.C. § 2412(d)(4) (1996 & Supp. 1999).

of any study,[77] analysis, engineering reports, tests, or projects which the court finds necessary for the case, and reasonable attorney fees, including compensation for paralegals and law clerks at cost, as well as partner review and editing of associates' work.[78]

Attorney fees are calculated using a "lodestar" figure--that is, reasonable hours expended at a reasonable hourly rate[79] which takes into account travel time,[80] but not travel expenses.[81] Unlike the attorney fees of § 2412(b), fees awarded under § 2412(d) are subject to a $125 per hour cap.[82]

The $125 cap applies unless the court determines that an "increase in the cost of living or a special factor, such as the limited availability of qualified attorneys, justifies a higher fee."[83] The Supreme Court explained in Pierce v. Underwood[84] that the "limited availability of qualified attorneys"

---

[77]NAACP v. Donovan, 554 F. Supp. 715 (D.D.C. 1982).

[78]28 U.S.C. § 2412(d) (1996 & Supp. 1999). See S.E.C. v. Waterhouse, 41 F.3d 805 (2d Cir. 1994) (attorney fees not recoverable by pro se litigant); see also Merrell v. Block, 809 F.2d 639 (9th Cir. 1987).

[79]Blum v. Stenson, 465 U.S. 886, 898-900 (1984); Action on Smoking and Health v. C.A.B., 724 F.2d 211, 218 (D.C. Cir. 1984); see also Missouri v. Jenkins, 491 U.S. 274 (1989); Pierce v. Underwood, 487 U.S. 552 (1988).

[80]Crank v. Minnesota State Univ. Bd., 738 F.2d 348, 350 (8th Cir. 1984); Henry v. Webermeir, 738 F.2d 188, 194 (7th Cir. 1984) (when a lawyer travels he incurs opportunity costs based on clients with whom he could have been speaking).

[81]Action on Smoking and Health, 724 F.2d at 224.

[82]28 U.S.C. § 2412(d)(2)(A)(ii) (1996 & Supp. 1999). A 1996 amendment increased this amount from $75.00 to $125.00 per hour. Although attorney fees under § 2412(b) may exceed $125, they must still be reasonable. See Action on Smoking and Health, 724 F.2d at 211.

[83]28 U.S.C. § 2412(d)(2)(A)(ii) (1996).

[84]487 U.S. 552 (1988).

refers to attorneys with specialized skills in such areas as foreign law or language and not to attorneys with extraordinary levels of lawyerly knowledge and ability:

> If "the limited availability of qualified attorneys for the proceedings involved" meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the $75 cap--since the "prevailing market rates for the kind and quality of the services furnished" are obviously determined by the relative supply of that kind and quality of services. "Limited availability" so interpreted would not be a "special factor," but a factor virtually always present when services with a market rate of more than $75 have been provided. We do not think Congress meant that if the rates for all the lawyers in the relevant city--or even in the entire country--come to exceed $75 per hour (adjusted for inflation), then that market-minimum rate will govern instead of the statutory cap. To the contrary, the "special factor" formulation suggests Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be. If that is to be so, the exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question--as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the $75 cap, reimbursement above that limit is allowed.[85]

To recover the fees and expenses listed in § 2412(d)(1)(H), the person requesting them: (1) must be a "party" as defined by § 2412(d)(2)(B); (2) who "prevails" against the United States in a non-tort civil action; (3) when the United States position is not "substantially justified"; and (4) no special circumstances exist that would make award of the fees unjust. A "party" includes individuals with a net worth not exceeding $2,000,000; unincorporated businesses, partnerships, corporations, associations, or organizations employing less than 500 people with a net worth not exceeding $7,000,000; charitable organizations; or, for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title

[85] Id. at 571-72.

5.[86] These limits further the EAJA's goal of opening the court house doors to litigants with legitimate claims who could not otherwise challenge governmental activity.

The Supreme Court has yet to define directly when a party prevails within the meaning of § 2412(d)(1)(A). However, Congress has passed other fee shifting statutes that, like the EAJA, award attorney fees to "prevailing parties" and provide guidance for EAJA cases. In Hensley v. Eckerhart[87] the Supreme Court held that a party prevailed under of the Civil Rights Attorney's Fee Award Act[88] when it "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.'[89] Thus, once the party attains any of the desired benefits, it theoretically prevails and is eligible for fees and expenses.[90] Courts calculate the amounts according to the lodestar figure and consider the degree of success or the extent to which a party prevailed.[91]

---

[86]28 U.S.C. § 2412(d)(2)(B) (1996 & Supp. 1999). Cf. U.S. v. Land, Shelby County, 45 F.3d 397 (11th Cir. 1995) (property does not fit definition of "party" under EAJA); Kay v. Ehrler, 499 U.S. 432 (1991) (under Civil Rights Attorney's Fee Award Act, pro se litigant, who is also a lawyer, is not entitled to recover attorney fees).

[87]461 U.S. 424 (1983).

[88]42 U.S.C. § 1988 (1996 & Supp. 1999).

[89]Hensley v. Eckerhart, 461 U.S. 424, 433 (1943) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)); see also Hewitt v. Helms, 482 U.S. 755, 759-60 (1987) (where the plaintiff won on the merits but obtained none of the benefits he sought upon filing suit because the defendant was immune from damages and the plaintiff failed to request injunctive or declaratory relief); National Coalition Against Misuse of Pesticides v. Thomas, 828 F.2d 42, 44 (D.C. Cir. 1987) (remand to review EPA interim order concerning pesticides was not the outright ban on the pesticide's use sought by the plaintiff).

[90]Fair Share v. Law Enforcement Assistance Admin., 776 F.2d 1066 (D.C. Cir. 1985); Southern Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1481 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984). See also Hensley, 461 U.S. at 433 n.7.

[91]Blum v. Stenson, 465 U.S. 886, 898-900 (1984) (also included are novelty and complexity of issues, expertise of counsel and quality of representation); see also Riverside v. Rivera, 477 U.S. 561 (1986) (amount of damage award is only an element in the lodestar's reasonable attorneys fee); Pennsylvania v.

footnote continued next page

In keeping with the Hensley standard, a party need not succeed on all the issues to "prevail." The Ninth Circuit explained in Southern Oregon Citizens Against Toxic Sprays (SOCATS) v. Clark[92] that comparing the number of a party's successfully argued issues with the number of unsuccessful ones is irrelevant because a win on only one issue may achieve the common remedy sought through each issue. In SOCATS, the plaintiffs, who lived near or used a forest being sprayed with pesticides, prevailed because they were successful in obtaining injunctive relief to halt the spraying of pesticides, not because they prevailed on three out of four legal issues.[93]

Even limited successes enable parties to prevail for purposes of recovering fees and expenses. In Van Sant v. United States Postal Service[94] the Fourth Circuit held that, although the plaintiff's court-awarded remedy for the elimination of his postal service job was a small fraction of the relief requested, he had still prevailed:

> This litigation has continued for fourteen years. It has been before us four times. While Van Sant made elaborate and extravagant claims of violation of his rights as a result of a reduction in force in the United States Postal Service during which his position as a planning architect was eliminated, in the last analysis he achieved only very limited success. He ultimately prevailed only on his claim that his notice of termination was premature and that he was entitled to compensation for the period October 12, 1971 (the effective date of his actual release) to December 7, 1971 (the earliest date on which we determined that his termination could be legally effective). He had sought recovery of $400,000-$500,000 and reinstatement. He was denied reinstatement, and his recovery was limited to approximately $5,600.

(..continued)
Delaware Valley Citizens' Council, 478 U.S. 546 (1986) (superior quality of attorneys is reflected within the lodestar reasonable rate and should not increase the fee recovered).

[92]720 F.2d 1475, 1481 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984).

[93]Id.

[94]805 F.2d 141 (4th Cir. 1986), cert. denied, 480 U.S. 935 (1987).

> Not only was his recovery small in the monetary sense, the litigation resulted in the establishment of no new significant principles of law that would be of aid to any other person except in the extraordinarily unlikely event that the facts surrounding Van Sant's claim would be duplicated.
>
> At the same time, in a very limited sense, we think that Van Sant is a prevailing party within the meaning of the Act.[95]

This follows the principle in Hensley that awards fees where at least some of the desired benefit is achieved through litigation. Although his prevailing status made him eligible for fees, the court adjusted the recovery to reflect the reasonable amount of time required to accomplish the limited success at a reasonable hourly rate, not to exceed the $75/hour cap.[96]

Victory on an interim order or interlocutory matter may be sufficiently significant to qualify the litigant as a prevailing party.[97] The Tenth Circuit awarded attorney fees in Kopunec v. Nelson[98] where the plaintiff received only preliminary injunctive relief against deportation and reversal of the Immigration and Naturalization Service's (INS) automatic revocation of his visa, pending further agency proceeding. Because the relief obtained was the remedy sought, and the relief was significantly distinct from the INS's ultimate grant or denial of the plaintiff's work visa, the plaintiff "prevailed."[99]

---

[95]Id. at 142.

[96]Id. at 142-43 (case decided under $75.00 cap on fees). See also Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782 (1989).

[97]See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1979), reprinted in 1980 U.S.C.C.A.N. 4990 (a fee award may be appropriate where the party has prevailed on an interim order, which was central to the case, or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit").

[98]801 F.2d 1226 (10th Cir. 1986).

[99]Id. at 1229.

The same principle applies to settlements. If the settlement produces substantially the same relief the plaintiff would have obtained if successful on the merits and bringing suit was the catalyst, then he has prevailed and is entitled to fees.[100]

Alternatively in Harahan v. Hampton,[101] the Supreme Court held that a purely procedural win with no substantive relief on the merits does not entitle the plaintiff to shift his attorney fees to the opposing party.

> The respondents have not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause. As a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed. Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected only the extent of discovery. As is true of other procedural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under § 1988.[102]

---

[100] See Cervantez v. Whitfield, 776 F.2d 556, 562 (8th Cir. 1985).

[101] 446 U.S. 754 (1980).

[102] Id. at 758-59. See also Brauwders v. Bowen, 823 F.2d 273, 275 (party must do more than win remand to administrative level for further proceedings to qualify as an EAJA prevailing party); Austin v. Department of Commerce, 742 F.2d 1417 (Fed. Cir. 1984) (remand for introduction of improperly withheld evidence is not a substantial remedy, therefore, the party does not prevail); Swietlawich v. County of Bucks, 620 F.2d 33 (3d. Cir. 1980) (vacation of judgement because of error in jury instructions and remand for new trial did not make plaintiff a prevailing party); Bly v. Mcleod, 605 F.2d 134 (4th Cir. 1979), cert. denied, 445 U.S. 928 (1980) (remand for clarification and impanelling of three-judge district court did not entitle party to prevail).

However, if a party ultimately prevails on the merits, the courts will normally reimburse fees and expenses incurred during the successful interim litigation.[103] Furthermore, courts may even compensate a plaintiff for time spent on unsuccessful interim issues if he ultimately prevails on the merits and the unsuccessful procedural issues are essentially the same as the issues that produced the win on the merits. For example, in Devine v. Sutermeister,[104] a party lost a motion to dismiss but yet prevailed overall by successfully arguing the same issue on the merits. The Court of Appeals found that the procedural motion to dismiss was subsumed by the identical issue on the merits. Although the plaintiff technically lost the interlocutory issue, he ultimately prevailed on the same issue at trial and the court awarded him fees for all of his efforts.[105]

The third element needed to recover fees and expenses from the United States concerns whether the government's "position" in the litigation and the underlying agency action[106] giving rise to the civil action was substantially justified.[107] This determination is made from the record without additional

---

[103]See, e.g., Brewer v. American Battle Monuments Comm'n., 814 F.2d 1564, 1567 (Fed. Cir. 1987); Miller v. United States, 779 F.2d 1378, 1389 (8th Cir. 1985); Massachusetts Fair Share v. Law Enforcement Assistance Admin., 776 F.2d 1066, 1068 (D.C. Cir. 1985).

[104]733 F.2d 892 (Fed. Cir. 1984), cert. denied, 484 U.S. 815 (1987).

[105]Id. at 898.

[106]28 U.S.C. § 2412(d)(2)(D) (1996 & Supp. 1999).

[107]28 U.S.C. § 2412(d)(1) (1996 & Supp. 1999). See Zapon v. U.S., 53 F.3d 283, 284 (9th Cir. 1995) (prevailing party not entitled to award if court finds position of U.S. substantially justified or that special circumstances make award unjust); Wang v. Horio, 45 F.3d 1362 (9th Cir. 1995) (Attorney General refusal to certify informant as acting within scope of employment for 28 U.S.C. § 2679 immunity purposes was "substantially justified" and attorney fees under EAJA not recoverable); Gilbert v. Shalala, 45 F.3d 1391, 1394 (10th Cir. 1995) (government bears burden of showing its position was substantially justified).

discovery or evidentiary hearing.[108] Prior to the 1985 revision of the EAJA, all but one of the circuits held that the governmental position was substantially justified if it had a reasonable basis in law and fact.[109] Although the 1985 revision left the "substantially justified" language unaltered, an accompanying House Report interpreted the standard to mean more than mere reasonableness because the 1980 Congress rejected a "reasonably justified" standard in favor of a "substantially justified" one.[110] Thereafter the circuits split over whether the standard was merely reasonable in law and fact[111] or more than reasonable.[112]

---

[108]28 U.S.C. § 2412(d)(1)(B) (1996 & Supp. 1999). See Friends of Boundry Waters Wilderness v. Thomas, 53 F.3d 881 (8th Cir. 1995) (determination of "substantially justified" is based on decision on the merits and the rationale that supports the decision).

[109]U.S. v. Yoffe, 775 F.2d 447 (1st Cir. 1985); Citizens Council of Del. County v. Brinegar, 741 F.2d 584, 593 (3rd Cir. 1984); Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985); Hanover Building Materials, Inc. v. Gruffuda, 748 F.2d 1011, 1015 (5th Cir. 1984); Trident Marine Construction, Inc. v. District Engineer, 766 F.2d 974, 980 (6th Cir. 1985); Ramos v. Haig, 716 F.2d 471, 473-74 (7th Cir. 1983); Foley Construction Co. v. U.S. Army Corps of Engineers, 716 F.2d 1202, 1204 (8th Cir. 1983), cert. denied, 466 U.S. 936 (1984); Foster v. Tourtellotte, 704 F.2d 1109, 1112 (9th Cir. 1983); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1486-87 (10th Cir.), cert. denied, 469 U.S. 825 (1984); Ashburn v. United States, 740 F.2d 843 (11th Cir.1984); Broad Ave. Laundry and Tailoring v. United States, 693 F.2d 1387, 1391 (Fed. Cir. 1982). But see Spencer v. Nat'l Labor Rel. Bd., 712 F.2d 539 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984).

[110]H.R. Rep. No. 120, 99th Cong., 1st Sess. 8 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 136.

[111]Sierra Club v. Sec'y of Army, 820 F.2d 523 (1st Cir. 1987); Garcia v. Schweiker, 829 F.2d 396 (3d Cir. 1987); Pullman v. Bowen, 820 F.2d 105 (4th Cir. 1987); Broussard v. Bowen, 828 F.2d 310 (5th Cir. 1987); Adams & Westlake, Ltd. v. Nat'l Labor Rel. Bd., 814 F.2d 1161 (7th Cir. 1987); Barry v. Bowen, 825 F.2d 1324 (9th Cir. 1987); Kemp v. Bowen, 822 F.2d 966 (10th Cir. 1987).

[112]Riddle v. Secretary of Health & Human Serv., 817 F.2d 1238 (6th Cir.), vacated, 823 F.2d 184 (6th Cir. 1987); United States v. 1,378.65 Acres of Land, 794 F.2d 1313 (8th Cir. 1986); Gavette v. OPM, 808 F.2d 1456 (Fed. Cir. 1986); Federal Election Comm'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986).

In Pierce v. Underwood,[113] the Supreme Court settled the issue, adopting the traditional interpretation. The court held that the government's position was substantially justified when it was "justified to a degree that would satisfy a reasonable person."

> Before proceeding to consider whether the trial court abused its discretion in this case, we have one more abstract legal issue to resolve: the meaning of the phrase "substantially justified" in 28 U.S.C. § 2412(d)(1)(A). The Court of Appeals, following Ninth Circuit precedent, held that the Government's position was "substantially justified" if it "had a reasonable basis both in law and fact."
>
> The source of that formulation is a Committee Report prepared at the time of the original enactment of the EAJA, which commented that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact." H.R. Conf. Rep. No. 96-1434 p.22 (1980).
>
> In addressing this issue, we make clear at the outset that we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it--whether that be "reasonable basis in both law and fact" or anything else. "Substantially justified" is the test the statute prescribes, and the issue should be framed in those terms. That being said, there is nevertheless an obvious need to elaborate upon the meaning of the phrase. The broad range of interpretations described above is attributable to the fact that the word "substantial" can have two quite different--indeed, almost contrary--connotations. On the one hand, it can mean "[c]onsiderable in amount, value, or the like; large," Webster's New International Dictionary 2514 (2d ed. 1945)--as, for example, in the statement "he won the election by a substantial majority." On the other hand, it can mean "[t]hat is such in substance or in the main," ibid--as, for example, in the statement "what he said was substantially true." Depending upon which connotation one selects, 'substantially justified' is susceptible of interpretations ranging from the Government's to the respondent's.
>
> We are not, however, dealing with a field of law that provides no guidance in this matter. Judicial review of agency action, the field at issue here, regularly proceeds under the rubric of "substantial evidence" set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(E). That phrase does not mean a large or

[113]487 U.S. 552 (1988). See also Commissioner v. Jean, 496 U.S. 154 (1990); Flores v. Shalala, 49 F.3d 562 (9th Cir. 1995).

considerable amount of evidence, but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB. In an area related to the present case in another way, the test for avoiding the imposition of attorney's fees for resisting discovery in district court is whether the resistance was "substantially justified," To our knowledge, that has never been described as meaning "justified to a high degree," but rather has been said to be satisfied if there is a "genuine dispute," . . . or "if reasonable people could differ as to [the appropriateness of the contested action]," . . . . [citations omitted].

We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"--that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. . . . To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.

Respondents press upon us an excerpt from the House Committee Report pertaining to the 1985 reenactment of the EAJA, which read as follows:

> "Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness."

If this language is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot of course, be the former since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter--because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. (Quite obviously, reenacting precisely the same language would be a strange way to make a change.) This is not, it should be noted, a situation in which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the line that the quoted Committee Report

> suggested. Such a reenactment, of course, generally includes the settled judicial interpretation. Lorillard v. Pons. Here, to the contrary, the almost uniform appellate interpretation (12 Circuits out of 13) contradicted the interpretation endorsed in the committee report. . . . Only the District of Columbia Circuit had adopted the position that the Government had to show something "slightly more" than reasonableness. Spencer v. NLRB, cert. denied, 466 U.S. 936 (1984). We might add that in addition to being out of accord with the vast body of existing appellate precedent, the 1985 House Report also contradicted, without explanation, the 1980 House Report ("reasonableness in law and fact") from which, as we have noted, the Ninth Circuit drew its formulation in the present case.
>
> Even in the ordinary situation, the 1985 House Report would not suffice to fix the meaning of language which that reporting Committee did not even draft. Much less are we willing to accord it such force in the present case, since only the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage, and so unadministerable, as "more than mere reasonableness." Between the test of reasonableness, and a test such as "clearly and convincingly justified"--which no one, not even respondents, suggests is applicable--there is simply no accepted stopping-place, no ledge that can hold the anchor for steady and consistent judicial behavior.[114]

* * * *

Some courts endorse proportional awards of fees and expenses where the government's position on one issue is substantially justified and not substantially justified on another.[115] Others have not broached the subject, perhaps because they focus on the overall position of the government, decreasing awards through the lodestar figure where the United States was substantially justified during some issues but not on others.[116]

---

[114]487 U.S. at 563-68.

[115]See, e.g., Baeder v. Heckler, 826 F.2d 1345 (3d Cir. 1987); Goldhaber v. Foley, 698 F.2d 193, 197 (3d Cir. 1983). Where issues are argued in the alternative, in pursuit of a single remedy, the focus is instead on the substantial justification of the government's overall position. See Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984).

[116]Cf. Trichila v. Secretary of Health and Human Services, 823 F.2d 702, 708 (2d Cir. 1987) (court refused to analyze the government's position during its opposition to an EAJA award separately from its

footnote continued next page

Finally, fees and expenses are recoverable under § 2412(d) only where no special circumstances would make an award of fees unjust.[117] The courts have held special circumstances to exist where the government advances good faith arguments for novel and creditable interpretations of the law[118] and where equitable considerations mitigate against allowing a prevailing party to recover fees.[119] The government has the burden of proof on both the "special circumstances" and the "substantially justified" issues.[120]

(3) 5 U.S.C. § 504.

The EAJA also allows recovery of fees and expenses incurred during an agency adjudication.[121] The fees and expenses, identical to those found in 28 U.S.C. § 2412(d),[122] are paid

---

(..continued)
position on the merits; once the government was not substantially justified on the merits it was deemed not substantially justified in resisting award of attorney fees).

[117]28 U.S.C. § 2412(d)(1)(B) (1996 & Supp. 1999).

[118]Russell v. National Mediation Bd., 775 F.2d 1284, 1290 (5th Cir. 1985) (although the government's interpretation of the law was novel, it was not credible).

[119]Taylor v. United States, 815 F.2d 249 (3d Cir. 1987) (a serviceman, unable to leave Spain after being placed on legal hold status by the Navy pending a Spanish trial for vehicular manslaughter but protected from the Spanish authorities by his service status, fled to the United States upon his conviction. He successfully enjoined the Navy from sending him back to Spain but because he had availed himself of the Navy's protection he was not entitled to fees and expenses for resisting his return to Spain).

[120]Id. at 253 (for special circumstances); Sierra Club v. Sec'y of Army, 820 F.2d 513 (1st Cir. 1987); Gilbert v. Shalala, 45 F.3d 1391 (10th Cir. 1995) (government bears burden of showing its position was substantially justified); Ellis v. Bowen, 811 F.2d 814 (3d Cir. 1987) (for substantial justification).

[121]5 U.S.C. § 504(a)(1) (1996 & Supp. 1999); § 504 (b)(1)(C) (1996); General Dynamics Corp. v. United States, 49 F.3d 1384 (9th Cir. 1995) (5 U.S.C. § 504 allows a prevailing party to recover attorney fees from U.S. in an adversary proceeding).

from agency appropriations[123] if (1) the government's position during the agency adjudication and underlying agency action[124] is not substantially justified, (2) a party[125] prevails over the United States, and (3) no special circumstances make the award of fees unjust, or, in certain circumstances where the government has made an excessive demand for fees.[126]

Agency adjudications under 5 U.S.C. § 554 include proceedings wherein the government's position is represented by counsel[127] and appeals to agency boards of contract appeal pursuant to the Contract Disputes Act of 1978.[128]

In Ardestani v. Immigration and Naturalization Service,[129] the Supreme Court determined that the most natural reading of the EAJA's applicability to adjudications or proceedings "under section 504" is that an adjudication must be "subject to" or "governed by" § 504. The Court noted that the adjudicative proceeding required by the Immigration and Nationality Act (INA),[130] though conforming closely to the procedures of the APA, is not governed by the APA. In fact, the INA had been

---

(..continued)

[122]5 U.S.C. § 504(b)(1)(A) (1996 & Supp. 1999).

[123]Id. § 504(d) (1996 & Supp. 1999).

[124]See id. § 504(b)(1)(E) (1996 & Supp. 1999) (defining "position of the agency").

[125]See id. § 504(b)(1)(B) (1996 & Supp. 1999) (defining "party").

[126]Id. § 504(a)(1) (1996 & Supp. 1999).

[127]Id. § 504(b)(1)(C)(i) (1996 & Supp. 1999).

[128]Id. § 504(b)(1)(C)(ii) (1996 & Supp. 1999). Contractually related adjudications such as bid protests are not covered by the Contract Disputes Act and attorney fees may be recovered through statutory authority other than the EAJA.

[129]502 U.S. 129 (1991).

[130]8 U.S.C. § 1252 (1952).

footnote continued next page

expressly amended by Congress to overrule legislatively an earlier Supreme Court case extending the APA to immigration proceedings.[131] The Court explained that because the EAJA "renders the United States liable for attorney's fees for which it would not otherwise be liable," the EAJA "amounts to a partial waiver of sovereign immunity."[132] Such waivers "must be strictly construed in favor of the United States."[133]

(..continued)

[131] Ardestani, 502 U.S. at 133.

[132] Id.

[133] Id. (citing other cases by footnote.)